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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Middleby Marshall, Inc.

Serial No. 74/601,983

David E. Bennett of Rhodes, Coats & Bennett, L.L.P. for applicant.

Albert J. Zervas, Trademark Examining Attorney, Law Office 104 (Sidney I. Moskowitz, Managing Attorney).

Before Simms, Hanak and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Middleby Marshall, Inc. has filed an application to register the term "RAPIDSTEAM" as a trademark for "commercial electric cooking steamers.[1]

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods, the term "RAPIDSTEAM" is merely descriptive of them.[2]

[1] Ser. No. 74/601,983, filed on November 24, 1994, which alleges dates of first use of September 10, 1993.

[2] Although the Examining Attorney also made final a requirement that applicant clarify the identification of its goods, such requirement was subsequently withdrawn in light of an acceptable amendment thereto contained in applicant's request for reconsideration.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of any ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, in support of its position that the term "RAPIDSTEAM" is suggestive rather than merely descriptive of its commercial electric cooking steamers, attempts to counter the third-party registrations made of record by the Examining Attorney[3] by relying upon a six-page listing, submitted with its request for reconsideration of the final refusal, of information assertedly pertaining to 31 additional third-party registrations.[4] Although the Examining Attorney, in his denial of the request for reconsideration, treated such information as forming part of the record, the Examining Attorney in his appeal brief contends that the "registrations need not to be considered ... since they have been taken from a printout from an *unknown*

[3] The Examining Attorney characterizes such evidence in his brief as demonstrating "the Patent and Trademark Office's regular practice of requiring disclaimers in [registrations of] marks containing the term RAPID--combined with nouns and verbs--of RAPID and the noun or verb." Examples thereof include disclaimers of the words "RAPID RELEASE" in the registration for the mark "RAPID RELEASE" and design for "nutritional supplements"; the term "RAPID-SEAL" in the registration for the mark "PHELAN'S RAPID-SEAL" and design for a "latex wall sealer"; and the words "RAPID SEAL" in the registration of the mark "PRC RAPID SEAL" for "sealants and caulking compounds".

[4] Such listing, applicant maintains in its brief, was obtained from "[a] search of currently registered trademarks on the Principal Register [which] shows over 30 'RAPID' marks that fit the following criteria: not registered via §2(f), not originating with the Supplemental Register, not based on a design or stylization, and registered in 1988 or later (see Exhibit A to Applicant's Request for Reconsideration)." According to applicant, "[t]he presence of this many 'RAPID' marks of this type demonstrates that 'rapid' is suggestive, not descriptive." In particular, applicant stresses as being analogous to the registration it seeks herein the registration for the mark "RAPID MIST" (with "MIST" disclaimed) for "humidifiers" and the registration for the mark "RAPID EXCHANGE" (with "EXCHANGE" disclaimed) for "insert [sic] gas purging, pressurization, and ventilation systems sold as units ... for use in protection of electrical equipment in hazardous areas such as potentially explosive atmospheres in industrial environments".

database" and thus, absent copies of the actual registrations, "are not credible evidence of the existence" thereof.

As a general proposition, the Examining Attorney is correct that a mere listing of third-party registrations or other information pertaining thereto from a commercial database is insufficient to make such information of record. See, e.g., In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974). The proper procedure for making information concerning third-party registrations of record is, instead, to submit either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the Patent and Trademark Office's own computerized database. See, e.g., In re Consolidated Cigar Corp., 35 USPQ2d 1290, 1292 (TTAB 1995) at n. 3; In re Smith & Mehaffey, 31 USPQ2d 1531, 1534 (TTAB 1994) at n. 3; and In re Melville Corp., 18 USPQ2d 1386, 1388-89 (TTAB 1991) at n. 2. Thus, while the Examining Attorney correctly notes that applicant failed to follow the proper procedure, we nevertheless observe that inasmuch as no objection was ever raised by the Examining Attorney, in his denial of the request for reconsideration, to the third-party registration evidence offered by applicant, the objection asserted by the Examining Attorney in his brief is considered to have been waived, particularly since the Examining Attorney had previously treated the evidence as forming part of the record. See, e.g., In re Melville Corp., supra. Such evidence has accordingly been considered for whatever probative value it may have.

In the present case, the information furnished by applicant concerning third-party registrations is of very limited probative value. While, of course, uniformity of treatment is desirable, we are not privy to the file histories of the third-party registrations relied upon by applicant and thus, other than the speculations advanced by applicant, have no basis for knowing why such registrations were allowed. Consequently, as applicant acknowledges in its belief, "each mark must be judged on a case-by-case basis." See, e.g., In re Pennzoil Products Co., 20 USPQ2d 1753, 1758 (TTAB 1991).

Applicant, noting that the Examining Attorney has made of record definitions from Webster's II New Riverside University Dictionary (1994) which in relevant part define "rapid" as an adjective meaning "[m]oving, acting, or occurring with great speed: SWIFT" and "steam" as a noun signifying "**1. a**. The vapor phase of water. **b.** The mist of cooling water vapor. **2.** Steam heating" and as a verb connoting "**1.** To produce or emit steam," argues in essence that, in view thereof:

> Clearly, the mark RAPIDSTREAM is subject to multiple interpretations, within the context of cooking steamers, one of which that accurately suggests a characteristic or quality of Applicant's goods, several of which that do not. A consumer confronted by the mark on Applicant's goods would be forced to use imagination, thought and perception to reach a proper conclusion as to the nature of the goods. For instance, the consumer might first believe that the goods use high velocity steam to cook the goods, but this would be untrue. Or, the consumer might believe that Applicant's goods are somehow able to more quickly steam cook the food, this would also be untrue (Applicants [sic] goods may start cooking sooner, but the

> actual cooking time is the same). Or possibly, the RAPIDSTREAM mark might correctly suggest to the consumer that the Applicant's goods are able to generate steam quickly. Only by collecting additional information will a consumer be able to sort through the possible meanings and determine whether the mark accurately describes the product.

The Examining Attorney, on the other hand, asserts that "consumers of applicant's goods will immediately perceive the mark as describing a feature" of applicant's commercial electric cooking steamers "in view of (a) the [above-noted] dictionary definitions of both RAPID and STEAM, (b) use of the terms in widely distributed published materials in the United States and (c) applicant's advertising materials which promote fast steaming and the rapid steam feature of the goods." In particular, citing the dictionary definitions of record, the Examining Attorney contends that combining the words "RAPID" and "STEAM" to form the term "RAPISTEAM" results in "the following meanings in the context of applicant's commercial electric steamers:" (1) "the vapor in the steamer moves with great speed" and (2) "the steamer steams (i.e. cooks) food swiftly or with great speed." Both of these meanings, according to the Examining Attorney, merely describe a feature of applicant's goods.

As to the first of such meanings, the Examining Attorney insists that his position is further supported by "excerpts from the NEXIS database cited in the May 15, 1996 [Office] action," including references to "a rapid steam shut-off valve," "a rapid steam-generator," "a rapid steam overlay" and "[r]apid steam heat used for stave bending". None of the "NEXIS"

excerpts, however, is indicative of the connotation of a rapidly moving steam feature. Instead, to cite the representative examples above, it is the "steam-generator," the "steam overlay," the "steam shut-off valve" and the "steam heat" which, in each instance, is rapid rather than the steam itself which is moving with great speed.

Moreover, as pointed out by applicant in its brief (***emphasis in original***):

> [T]he examining attorney clearly misunderstands how Applicant's goods function. Providing instantaneous steam, as described in the [advertising literature furnished as] specimens, simply means that steam is available for use in cooking quickly, i.e., in a short amount of time. The phrase [RAPIDSTEAM] does **not** mean, as the examining attorney suggests, that the steam moves at high velocity. The steam in Applicant's goods moves at a moderate, or even slow, pace. Through the judicious use of valving the *steam is available on short notice* ***but it simply does not move at high rates of speed.*** Thus, the examining attorney's reliance on the meaning of "water vapor moving with great speed" as descriptive of Applicant's goods is misplaced and cannot be a basis for rejection ....

Although the Examining Attorney criticizes applicant for the failure to provide any evidentiary support for its assertions as to the rate at which steam moves in applicant's goods or relative to those of its competitors, there likewise is nothing in the record which lends credence to the Examining Attorney's contention. We consequently reject the first of the meanings postulated by the Examining Attorney as being merely descriptive of applicant's goods.

With respect to the second of the meanings asserted, the Examining Attorney comes very close to the mark, although he still is not quite accurate in his assessment. According to applicant's brief, rather than cooking food swiftly, as contended by the Examining Attorney, it is the case that:

> Applicant's goods cook the food at the same rate as other commercial steamers. It is well-known in the field of commercial steamers that food being cooked by steam cooks at a fixed rate depending on the food chosen and the pressure of the steam. Applicant's steamer does not generate greater steam pressure than other commercial cookers, thus, it cannot be said that Applicant's goods cook food faster than other competitive products. Thus, the examining attorney's reliance on the meaning of "to cook using steam with great speed" as descriptive of Applicant's goods is misplaced and cannot be a basis for rejection.

The Examining Attorney, however, points out that:

> [P]urchasers of commercial steamers would likely be sensitive to the rate of steam cooking--they are in the business of cooking food, and would desire steamers that steam rapidly or have rapid steam. With [such] a rapid steamer ... they would be able to save time and hence minimize the expense of food preparation ....

Consequently, in the sense that the term "RAPIDSTEAM" connotes rapidly available steam, resulting in quicker overall cooking time since the interval required for the steamer to produce steam is reduced, such term is merely descriptive of a feature or characteristic of applicant's goods.

Applicant admits, in this regard, that a "possible meaning of the combined terms 'rapid' and 'steam' is 'to produce or emit steam with great speed'" and that "[t]his is the meaning

which is intended to be suggestive of Applicant's goods, [in the sense of] meaning that Applicant's goods produce steam quickly once turned on." Such meaning, however, is the one which is immediately conveyed by the term "RAPIDSTEAM" when used in connection with applicant's commercial electric cooking steamers. Applicant's promotional materials, as correctly pointed out by the Examining Attorney, stress the rapid production or availability of steam which is generated by its cooking steamers. In particular, the advertising literature furnished by applicant as specimens of use, which contains the introductory statement "*Introducing--The NEW SteamMaster RAPID STEAM ...*," emphasizes that (*italics in original*):

> The *RapidSteam* is just that -- *RAPID!* From a cold start, you'll be ready to cook in less than 3½ minutes. An unexpected crowd in between meals? No problem! The *RapidSteam*'s idle mode provides instantaneous steam, at a fractional utility cost.

Other literature submitted by applicant repeats the claim that "The RapidSteam is just that -- RAPID!" while also stressing the product's "Quick Start-up" and an "Automatic Idle Mode," which "[a]llows for fast preheat and recovery." Clearly, when encountered in such context, and given the fact, which we judicially notice, that the word "rapid" is defined by The Random House Dictionary of the English Language (2d ed. 1987) at 1600 as meaning "**1.** occurring within a short time; happening speedily: *rapid growth*,"[5] purchasers and potential customers of applicant's

[5] It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and

commercial electric cooking steamers would readily understand, without any need for imagination, cogitation, mental processing or the gathering of further information, the merely descriptive significance of the term "RAPIDSTEAM".[6]

Accordingly, because such term conveys forthwith an immediate idea of a significant characteristic or feature of applicant's goods, namely, that they produce or provide steam rapidly, the term "RAPIDSTEAM" is merely descriptive of commercial electric cooking steamers within the meaning of the statute. See In re Quick-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980) [mark "QUIK-PRINT" held merely descriptive of printing services].

Decision: The refusal under Section 2(e)(1) is affirmed.

R. L. Simms

University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

[6] Applicant's reliance on such cases as Colgate-Palmolive Co. v. House for Men, Inc., 143 USPQ 159, 160 (TTAB 1964) [dicta indicating that "the term 'RAPID-SHAVE' does not describe any characteristic or function of a shaving cream"] and Regent Standard Forms, Inc. v. Textron Inc., 172 USPQ 379, 382 (TTAB 1971) [dicta stating that term "RAPID" in mark "RAPIDCARD" for message and mailing forms and mark "RAPIDFORMS" for carbon interleaved message forms "undoubtedly possesses a suggestive connotation as applied to the goods"] are not persuasive of a different result. Unlike the present case, there was nothing of record in the former case which showed that the particular shaving cream itself was more rapidly available or provided a quicker shave than other shaving creams, while in the latter case, the marks were simply highly suggestive of the desired speed to be obtained in using the goods inasmuch as nothing in the record demonstrated that the forms were more rapid or quicker than other forms of the same kinds. Here, by contrast, applicant's literature emphasizes, and applicant concedes, that its "RAPIDSTEAM" cooking steamer provides or produces, relative to other such products, rapid steam, that is, the steam itself is available within a short period of time.

E. W Hanak

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board